

1 Steve W. Berman (*Pro hac vice*)
2 Craig R. Spiegel (SBN 122000)
3 Emilee Sisco (*Pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
3 1918 Eighth Avenue, Suite 3300
4 Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craig@hbsslaw.com
emilees@hbsslaw.com

7 Bruce L. Simon (SBN 96241)
8 Benjamin E. Shiftan (SBN 265767)
9 PEARSON, SIMON & WARSHAW, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
bshiftan@pswlaw.com

12 *Class Counsel for Jenkins and Consolidated
Action Plaintiffs*

Jeffrey L. Kessler (*Pro hac vice*)
David G. Feher (*Pro hac vice*)
David L. Greenspan (*Pro hac vice*)
Joseph A. Litman (*Pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jlitman@winston.com

Sean D. Meenan (SBN 260466)
Jeanifer E. Parsigian (SBN 289001)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
smeenan@winston.com
jparsigian@winston.com

13 *Class Counsel for Jenkins and Consolidated
Action Plaintiffs*

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 OAKLAND DIVISION

19 IN RE: NATIONAL COLLEGIATE
20 ATHLETIC ASSOCIATION ATHLETIC
GRANT-IN-AID CAP ANTITRUST
LITIGATION

22 This Document Relates to:

23 ALL ACTIONS

Case No. 4:14-md-02541-CW
Case No. 4:14-cv-02758-CW

PLAINTIFFS' MOTION TO COMPEL
TESTIMONY OF AMY
HUCHTHAUSEN

Date: October 2, 2018
Time: 2:30 p.m.
Dept: Courtroom 2, 4th Floor
Judge: Hon. Claudia Wilken
Complaint Filed: March 5, 2014

1 On the eve of deposing defendants' trial witness Amy Huchthausen, Commissioner of the
 2 America East Conference, defendants cancelled the deposition, saying she would not be called at
 3 trial. For the reasons explained below, plaintiffs' motion seeks the Court to order Ms. Huchthausen to
 4 provide testimony during the trial by contemporaneous transmission (live video) from a different
 5 location pursuant to Federal Rule of Civil Procedure 43(a), as a witness called by plaintiffs.
 6 Alternatively, plaintiffs request the Court order the previously properly noticed deposition to proceed
 7 prior to the trial's completion.

8 I. FACTS

9 Ms. Huchthausen has made recent public statements that will directly contradict at least one
 10 of defendants' core claims at trial. Ms. Huchthausen appeared on a panel during the 12th annual MIT
 11 Sloan Sports Analytics Conference on February 23-24, 2018. The panel topic was "Life of the
 12 College Student Athlete" and is described as "explor[ing] the current state of amateurism in the
 13 United States as well as the intersection of interest between schools and their athletes from the
 14 perspective of both former players and administrators."¹ As the Commissioner of the America East
 15 Conference, Ms. Huchthausen represents the conference's member institutions concerning collegiate
 16 athletics. The member institutions in this "mid-major" conference include: Albany, Binghamton,
 17 Hartford, New Hampshire, UMass Lowell, Maine, Stony Brook, UMBC, and Vermont.

18 During the panel discussion, the moderator asked Ms. Huchthausen a direct question,
 19 targeting one of the fundamental issues in this case – what would be the impact of allowing revenue-
 20 generating athletes at power five schools to get paid? Ms. Huchthausen gave an extended, thoughtful
 21 answer. Plaintiffs submit the video of Ms. Huchthausen's full answer for the Court.² As the Court
 22 will see, Ms. Huchthausen never intimated that consumer demand would be adversely impacted
 23 whatsoever (for any school) or that "academic integration" would suffer in any way. In fact, Ms.
 24 Huchthausen said that for mid-major conferences like hers, things would not actually look much
 25 different.

26 ¹ See Declaration of Jeff D. Friedman in Support of Plaintiffs' Motion to Compel Testimony of
 27 Amy Huchthasen (Friedman Decl.), Exhibit 1 (filed concurrently herewith).

28 ² Friedman Decl., Exhibit 2.

1 Also, critically, Ms. Huchthausen expressly contradicts defense witnesses' claims that if
 2 some schools elect to pay players, it would cause an adverse impact on other conferences whose
 3 schools chose not to pay student athletes. Rejecting one of defendants' key claims, Ms. Huchthausen
 4 explained that it could actually benefit schools with fewer resources if other schools with greater
 5 resources paid players. She explained that if power five autonomy level schools paid players, for
 6 example, it might "equalize some things from a competitive standpoint because they [the power five
 7 conference schools] won't be able to spend money on ten nutritionists because they're going to have
 8 to put some money, give some of that money to student athletes in this model." In other words, this
 9 potential change in compensation model, according to Ms. Huchthausen, at worst would have little
 10 or no impact on conferences such as hers.

11 It is unclear what triggered defendants' last minute cancellation of the deposition. For more
 12 than two months, defendants have represented that Ms. Huchthausen would testify at trial. On June
 13 12, 2018, defendants disclosed Ms. Huchthausen on Defendants' Intended Live Witnesses list. ECF
 14 No. 841-2. And on July 3, 2018, the Court ordered defendants to make the witnesses at issue
 15 available for deposition, including Ms. Huchthausen, "to the extent that Defendants intend to offer
 16 the testimony of such witnesses at trial. Any such depositions shall be completed no later than
 17 August 24, 2018." ECF No. 864. Ten days after the Court's order compelling deposition testimony
 18 of defendants' intended trial witnesses, on July 13, 2018, defendants filed their witness list, once
 19 again *re-affirming their intent* to call Ms. Huchthausen at trial. ECF No. 915.

20 In the July 13, filing, defendants told the Court that Ms. Huchthausen was expected to testify
 21 about "the negative consequences that would occur in conferences like the America East Conference
 22 if nationally applicable rules were disallowed and rules were developed and enforced merely on a
 23 conference-by-conference or college-by-college basis." ECF No. 915 at 3-4.

24 Plaintiffs noticed Ms. Huchthausen's deposition to occur on the parties agreed-upon date of
 25 August 22, 2018, in New York, and prepared accordingly, including deciding to forego certain
 26 questions of other witnesses who were being deposed because Ms. Huchthausen would potentially be
 27 a better witness to answer certain questions for certain topics.

But on Monday, August 20, at 5:00 p.m., less than two days before the scheduled deposition of Ms. Huchthausen, defense counsel sent an email which in part stated: "Defendants decline to state before the conclusion of the upcoming depositions whether the deponent will or will not testify at trial, but we will inform Plaintiffs promptly if a decision has definitively been made not to call any of the deponents. In that regard, Defendants have determined that they will not call Amy Huchthausen at trial. As a result, her deposition will not proceed this week." Plaintiffs immediately notified defense counsel that we wanted the deposition proceed as scheduled on August 22. But defendants refused. Accordingly, plaintiffs ask the Court for relief as more fully explained below.

II. ARGUMENT

A. Under Rule 43, Ms. Huchthausen should be ordered to provide live trial testimony from a location allowed by Rule 45

1. Plaintiffs may call Ms. Huchthausen as a trial witness.

Plaintiffs have the right to call Ms. Huchthausen as a witness at trial, even though defendants stated in the August 20 email “that they will not call Amy Huchthausen at trial.” The 1993 advisory committee notes to Rule 26(a)(3)(A) explain that “[l]isting a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.” Ms. Huchthausen is still listed as a witness by defendants, who have not moved this court for leave to remove her from their witness lists or to exclude her testimony. As a result, plaintiffs have the right to call her as a trial witness. *See Igbinovia v. Catholic Healthcare West*, No. 07-cv-01170-GMN-GWF, 2010 WL 5070881, at *5 (D. Nev. Dec. 7, 2010) (“[Plaintiff] will not be precluded from using Defendants’ witness list. There is no prejudice to Defendants by allowing Plaintiff to call witnesses from Defendants’ list because Defendants are aware of all the individuals listed and had the opportunity to depose witnesses on their list.”) (citing 1993 advisory committee notes); *Mitchell v. Rosario*, No. 09-cv-03012-RCJ, 2015 WL 6437712, at *2 (E.D. Cal. Oct. 21, 2015) (“Plaintiff asks the Court to permit him to remove Kevin Fisher from his witness list. The Court grants the motion. Plaintiff has only asked to have Mr. Fisher removed from his own witness list and has not asked the Court to exclude his testimony. Defendants may still presumably call Mr. Fisher to testify.”).

1 **2. This Court has the authority to order Ms. Huchthausen to provide live trial**
 2 **testimony from a remote location.**

3 Ms. Huchthausen should be compelled to provide live trial testimony by contemporaneous
 4 transmission. Rule 43 of the Federal Rules of Civil Procedure authorizes “testimony in open court by
 5 contemporaneous transmissions from a different location” for “good cause in compelling
 6 circumstances and with appropriate safeguards.” Under Rule 45 of the Federal Rules of Civil
 7 Procedure, a person may be commanded to attend trial via contemporaneous transmission either:

- 8 (A) within 100 miles of where the person resides, is employed, or regularly transacts
 business in person; or
- 9 (B) within the state where the person resides, is employed, or regularly transacts
 business in person, if the person ... (ii) is commanded to attend a trial and would
 not incur substantial expense.

10 The geographic restrictions of Rule 45 are intended to “prevent undue inconvenience to witnesses
 11 not to confer advantages on parties.” *In re Washington Public Power Supply Sys. Sec. Litig.*, MDL
 12 No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1998) (citing 1980 advisory committee notes
 13 to Rule 45).

14 Good cause exists if a significant geographic distance separates the witness from the location
 15 of court proceedings such that the witness cannot be subpoenaed under Rule 45 to testify in person at
 16 trial. *See Beltran-Tirado v. Immigration and Naturalization Serv.*, 213 F.3d 1179, 1185 (9th Cir.
 17 2000) (“We reject Beltran’s claim that she was denied due process when the immigration judge
 18 permitted witness Wingberman to testify telephonically at Beltran’s deportation hearing.
 19 Wingberman was a sworn, out-of-state witness, and her testimony was subject to cross-
 20 examination. We have previously upheld the admission of this form of testimony under Federal Rule
 21 54 of Civil Procedure 43(a).”); *Ever Win Int’l Corp. v. Prong, Inc.*, No. CV 15-6433 DMG (GJSx),
 22 2017 WL 164063, at *1 (C.D. Cal. Jan. 6, 2017) (finding good cause for contemporaneous
 23 transmission under Rule 43 for two witnesses, one of whom lived overseas and the other in
 24 Massachusetts and explaining that “so long as [the witnesses] provide live testimony (albeit by
 25 videoconference) during trial, testify under oath, and are subject to cross-examination, appropriate
 26 videoconferencing technology can be used to accommodate the witness’ location.”).

1 safeguards exist"); *Warner v. Cate*, No. 12-cv-1146-LJO-MJS (PC), 2015 WL 4645019, at *2 (E.D.
 2 Cal. Aug. 4, 2015) (granting motion for contemporaneous transmission where witness residing in
 3 Texas could not be subpoenaed to testify at trial "because he lives out of state and more than 100
 4 miles away").

5 Good cause exists here, because Ms. Huchthausen resides and works on the East Coast and is
 6 not subject to this Court's subpoena power to appear in person at trial. Moreover, defendants have
 7 taken last-minute steps to preclude plaintiffs from deposing her in New York, by listing her as a trial
 8 witness twice and then, only two days before her deposition, telling plaintiffs that they will not call
 9 her as a trial witness. Because plaintiffs have the right to call her as a trial witness and because
 10 defendants refused to produce her for a deposition, there is good cause for granting this motion.

11 **3. In the alternative, Ms. Huchthausen should be compelled to provide deposition
 12 testimony.**

13 As an alternative to providing live testimony under Rule 43, Ms. Huchthausen should be
 14 compelled to provide deposition testimony prior to the end of trial. It could take place, for example,
 15 between the first and second week of trial in September. Defendants have attempted to preclude
 16 plaintiffs from taking her deposition by claiming two days before it was scheduled to occur that they
 17 will not call her at trial. Plaintiffs acknowledge that this Court's order authorizing her deposition
 18 granted plaintiffs' motion to compel "to the extent Defendants intend to offer the testimony of such
 19 witnesses at trial...." ECF No. 864. But that Order does not preclude plaintiffs from taking her
 20 deposition, because she is still listed on defendants' witness lists and defendants have not sought an
 21 order excluding her testimony, such that plaintiffs (as explained above) may call her as a trial
 22 witness. In fact, defendants listed her as a trial witness *after* this Court entered that Order. They
 23 should not be permitted to game the system and preclude relevant testimony and evidence by the
 24 expedient of claiming at the last minute that they will not call her at trial. Plaintiffs should be
 25 allowed either to present her testimony under Rule 43 or take her deposition, which could then be
 26 presented at trial.

III. CONCLUSION

Defendants should not be permitted to unilaterally exclude Ms. Huchthausen's testimony at trial by twice listing her as a trial witness, including *after* this Court granted plaintiffs' motion to compel her deposition, and then claiming only two days before her deposition that they will not call her as a trial witness. She is still listed as a trial witness by defendants, so that plaintiffs should be permitted to call her as a witness at trial under Rule 43, by contemporaneous transmission, or take her deposition, which may then be presented at trial.

DATED: August 22, 2018

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

WINSTON & STRAWN LLP

By /s/ Steve W. Berman
STEVE W. BERMAN (*pro hac vice*)

By /s/ Jeffrey L. Kessler
JEFFREY L. KESSLER (*pro hac vice*)

Craig R. Spiegel (SBN 122000)
Emilee Sisco (*pro hac vice*)
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
craigs@hbsslaw.com
emilees@hbsslaw.com

David G. Feher (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Joseph A. Litman (*pro hac vice*)
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
jlitman@winston.com

Jeff D. Friedman (SBN 173886)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jeff@hbsslaw.com

Sean D. Meenan (SBN 260466)
Jeanifer E. Parsigian (SBN 289001)
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
smeenan@winston.com
jparsigian@winston.com

PEARSON, SIMON & WARSHAW, LLP
By */s/ Bruce L. Simon*
BRUCE L. SIMON (SBN 96241)

Class Counsel for Jenkins and Consolidated Action Plaintiffs

Benjamin E. Shiftan (SBN 265767)
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415) 433-9008
bsimon@pswlaw.com
bshiftan@pswlaw.com

Class Counsel for Jenkins and Consolidated Action Plaintiffs

1 **ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(I)(3)**

2 Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in
3 the filing of this document has been obtained from the signatories above.

4

5 By: /s/ Steve W. Berman

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28